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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-205

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Oklahoma Lawyers Guild

September, 1973

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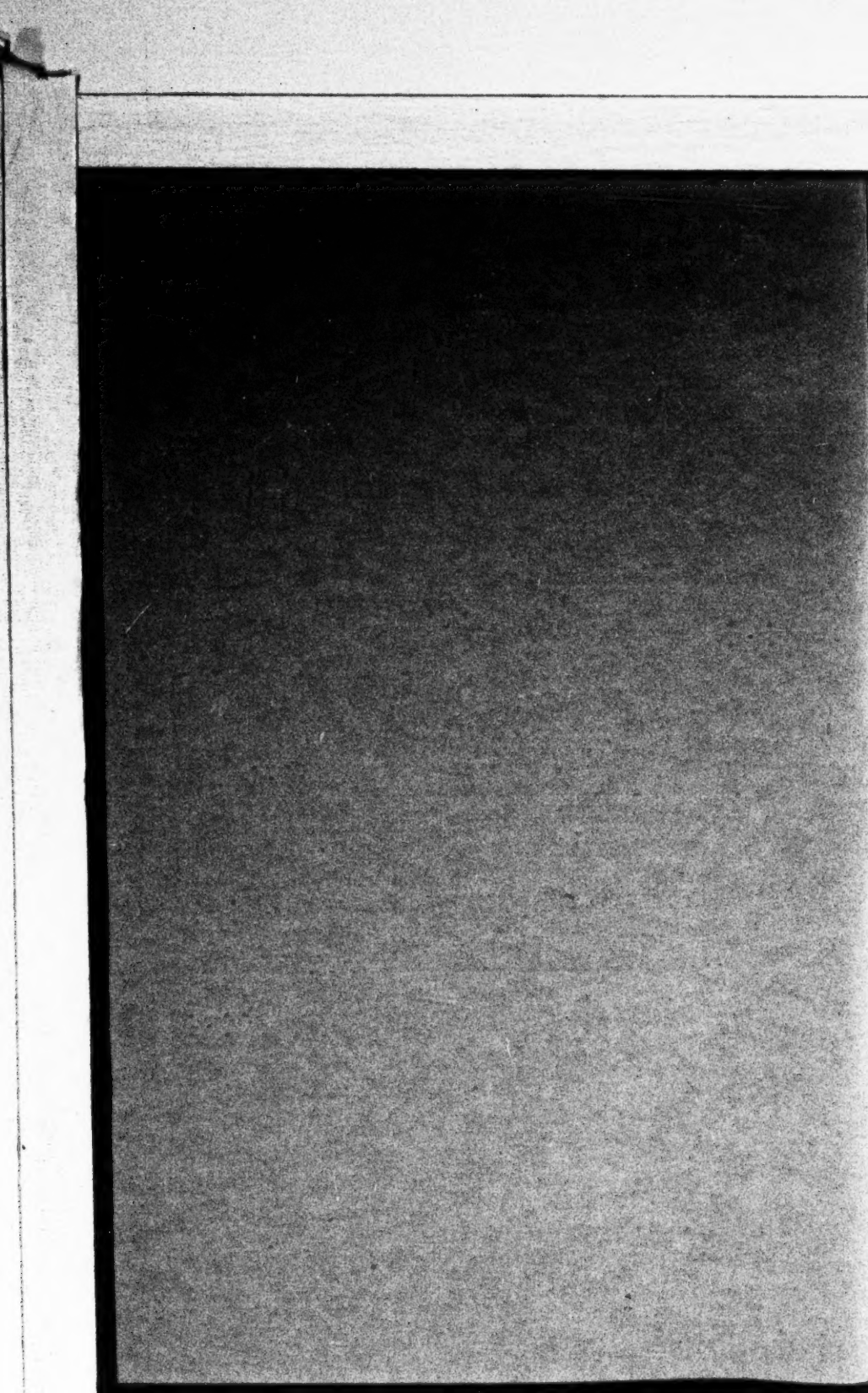

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. ————

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON PETITION FOR A WRIT OF CERTIORARI

This motion of the Oklahoma Lawyers Guild for leave to file annexed brief *amicus curiae* is made pursuant to Rule 42.1 of the Rules of this Court. Consent to file such a brief has been granted by petitioners. The Solicitor General has indicated willingness to consent as to issues raised by petition of Petitioners, but has withheld consent as to issues raised by the facts of the case but not raised in petition for certiorari.[1] We pray that the Court permit the entire brief to be filed, as annexed to this motion.

[1] Correspondence between *amicus curiae* and parties to the cases is appended to enclosed motion and annexed brief, on the question of consent to file.

INTEREST OF MOVANT

The National Lawyers Guild, of which movant Oklahoma Lawyers Guild is an active chapter, has forty chapters from coast to coast and several thousand members including attorneys, law students, paralegal workers, and "Jailhouse Lawyers" in Federal and State prisons throughout the nation. Since its organization over three decades ago, it has been active in litigation affecting the rights guaranteed by the Constitution and the Bill of Rights to freedom of expression, due process and equal protection of the law. This activity has included disinterested intervention in pending litigation as *amicus curiae*.

FUNCTION OF THIS BRIEF AMICUS CURIAE

Rule 42 of the rules of this Court provides that this motion must set forth questions of law that have not been, or will not adequately be, presented by the parties, and their relevancy to the disposition of the cases.

Questions presented by petition for writ of certiorari include:

> 1. Whether a conviction for entering a military base under 18 U.S.C. Section 1382 can be sustained in the absence of proof of specific intent to enter in violation of a lawful base regulation.
>
> 2. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

In conjunction with the argument made on the issue of specific intent, petitioners raised the corollary issue of fact that all evidence indicated that petitioners had the sole

intent of seeking an interview with the base commander in order to exercise their First Amendment rights. No evidence was presented to show that there was a specific intent to violate a lawful regulation or to disrupt the operations of the base.

Arguments of petitioners on these three points were sound and worthy of adoption and implementation by this Court. However, we feel that there are facts in the record not referred to by petitioners which shed light on the process by which the trier of fact reached his verdict against petitioners in spite of all evidence and legal precedent to the contrary which was placed before him. We also wish to argue that the issues are such as warrant summary reversal on the petition for writ of certiorari as in the strikingly similar case of *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam). As the Solicitor-General has expressed willingness that we intervene as *amicus curiae* on the above issues, we pray that this Court regard this as consent by both parties as to these issues.

We wish to raise two further issues squarely presented by the facts of the case but not raised in petition for writ of certiorari:

1. Whether the sentences imposed on the twelve petitioners disclose arbitrary discrimination by the trial judge on the illicit basis of gender, against males and for females.

2. Whether a comparison of sentences imposed on twelve petitioners to sentences imposed by the Magistrate on twenty persons charged simultaneously under 18 U.S.C. Section 1382, clause one, discloses arbitrary discrimination by the trial judge on the illicit

basis that petitioners chose to stand trial before the judge of the District Court, under 18 U.S.C. Section 3401(b), rather than sign a written consent to be tried before the magistrate.

The Solicitor-General contends that raising issues not raised by petition for certiorari is prohibited by Rule 23(1)(c) of the Rules of this Court. We have consulted with the Clerk of this Court through an assistant, and have been informed that the Solicitor-General has misinterpreted that part of the Rule which states that only issues raised in petition will be reviewed by the Court. Clearly the thrust of the Rule is to prevent discussion of issues not briefed for the Court, not to prevent *amicus curiae* from briefing and arguing additional issues properly under Rule 42.

The language of Rule 42.3 indicates that issues that have not been presented by petition for writ of certiorari may be raised by brief *amicus curiae* if relevant to the disposition of the cases.

These issues are clearly relevant, since if decided in favor of petitioners, the sentences imposed on them would be invalid. We will establish in the annexed brief that the sentences are invalid, that the Court of Appeals below ignored the sex-discrimination issue raised by petitioners, and sanctioned the trial judge's departure from accepted judicial practice as to both issues of discrimination.

These two issues together invoke every governing consideration for granting review listed in Rule 19(b) of the rules of this Court, as annexed brief will also show.

WHEREFORE, it is respectfully prayed that this motion for leave to file the annexed brief *amicus curiae* on peti-

tion for writ of certiorari be granted, partial refusal of the Solicitor-General to consent notwithstanding.

Respectfully submitted,

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Oklahoma Lawyers Guild

September, 1973

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. ————

JON RANDOLPH FLOYD, ET. AL.,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE ON BEHALF OF JON RANDOLPH FLOYD, ET AL., IN FAVOR OF CERTIORARI

QUESTIONS PRESENTED

This series of cases presents questions of law which go to the heart of the constitutional guarantees of right to trial by jury, right to due process and right to equal protection of the laws. These questions are:

1. Whether a conviction for entering a military base under 18 U.S.C. Section 1382, clause one, can be sustained in the absence of proof of specific intent to enter in violation of a lawful base regulation.

2. Whether persons seeking entrance to a military base for the purpose of exercising First Amendment rights may be arbitrarily excluded for that reason,

whereas persons entering for other lawful purposes are freely admitted.

3. Whether persons charged with a petty offense under federal law are entitled to a trial by jury when Congress has not specifically provided otherwise.

4. Whether the sentences imposed on the twelve petitioners disclose arbitrary discrimination by the trial judge on the illicit basis of gender, against males and for females.

5. Whether a comparison of sentences imposed on the twelve petitioners to sentences imposed on twenty others simultaneously charged under the same statute discloses arbitrary discrimination by the trial judge on the illicit basis that petitioners chose to stand trial before the judge of the District Court, under 18 U.S.C. Section 3401(b), rather than sign a written consent to trial before the magistrate; and whether certain remarks of the trial judge at sentencing tends to confirm this.

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the preceding Motion for Leave to File this brief.

ARGUMENT

1. The trial judge could not reasonably have found the element of specific intent required to be proven to sustain a conviction under the first paragraph of 18 U.S.C. Section 1382.

In the trial of the case, motions to dismiss and to render judgment of acquittal were made by petitioners at appropriate junctures on the ground that the Government failed to establish the *prima facie* element of specific intent.

The purpose here is not to repeat the able presentation of the legal theories involved in the case of *Holdridge* v. *United States*, 282 F.2d 302 (8th Circuit 1960), by petitioners for writ of certiorari. Rather, the purpose is to point out that these theories were brought to the attention of the trial judge, and were slurred over and ignored by him.

The Court of Appeals commented in its opinion that the intent and purpose elements of the offense charged were properly established by circumstantial evidence that petitioners entered the base despite orders to the contrary issued by gate guards, by Colonel Malone, and by warning signs and the existence of a fence.

The intent required to establish the offense charged was to violate a regulation, not to violate an order. There was no evidence of this intent in the record; indeed there was evidence to the contrary. The Court of Appeals misundestood the nature of the intent required.

The trial judge erred even more flagrantly in denying that intent of any kind is an element of the offense. His denial seems to have been based on analogy with the facts of the *Holdridge* case, which involved *clause 2* of Section 1382 proscribing *re-entry* after having previously been barred from the base. Mr. Justice (then Judge) Blackmun clearly drew this distinction, as petition for certiorari observes. Yet the trial judge overruled the motion to dismiss, saying, as to the distinction between clauses one and two:

> "Well, but they qualified their language to some extent and then later I think took that away. I'm well aware of the holding there *and the question is not free of doubt,* but I'm going to overrule your motion" (R. 22, 23). (Emphasis supplied.)

And on the motion for judgment of acquittal, the trial judge added:

> ". . . the Holdridge case that we all are apparently relying on and, apparently, all maybe draw some different interpretation of what the holding was, but there the trial court refused to permit evidence from the defendants as to why they entered or sought to reenter Mead Ordnance Depot at Mead, Nebraska, and the Circuit Court upheld that, said the intent with which they entered was not a necessary element of the offense—. . . and affirmed the conviction. We are all very well aware that's the holding. . . . The motions, the sundry motions, are overruled" (R. 279, 280).

This makes it clear that the trial judge sought to rely on the *Holdridge* case, that he erroneously applied the rationale of its holding to the facts of the instant cases and ignored the qualifying dictum of Mr. Justice Blackmun with regard to clause one. The Court of Appeals sanctioned this error by adding that all the intent required was that petitioners enter the base against orders, whereas intent to violate the regulation establishing an identification procedure was necessary. As the record shows, this latter regulation was promulgated the day prior to the allegedly criminal acts of petitioners, and the guard admitted (R. 111) that, contrary to normal procedure, he did not advise petitioners of the existence of this regulation.

If the Tenth Circuit meant to repudiate the *Holdridge* case, or if it did so inadvertently, the result is the same: a conflict with an important dictum of the *Holdridge* case which calls for clarification and resolution by this Court.

2. Evidence shows no intent to violate any lawful regulation in petitioners, but affirmatively shows an intent to exercise First Amendment rights which military authorities violated.

The trial judge expressed the belief that petitioners had whatever intent was required by the statute. In fact, the evidence is clear that petitioners entered in order to seek an audience with the base commander to convey to him their anti-war views. This is activity protected by the First Amendment right of assembly to convey views in a peaceable manner, and petitioners had no reason, as the evidence shows, to believe they were acting in violation of any regulation.

At this juncture the Court should direct its attention to the testimony of the gate guard, Mr. Alt, at page 111 of the Record. He testified that he departed from normal procedure in failing to advise petitioners and others of the existence of a prescribed identification process by which members of the public might enter the base. It is apparent, since the purpose of petitioners in seeking admittance was a valid one that would normally be granted, that petitioners were barred from the base and arrested for arbitrary and illicit reasons.

Flower v. *United States,* 407 U.S. 197 (1972) (per curiam), overturned petitioners conviction under *clause two* of this statute where such discrimination occurred, summarily on certiorari. The three dissenting justices would have granted certiorari to hear the case on the merits. The facts here are even stronger than *Flower,* because a greater degree of specific intent is required of

clause one offenses. Therefore this Court should grant certiorari on this issue in order to insure that the arbitrary attempts of government employees to suppress dissent on military reservations be curtailed and discouraged. The hasty promulgation of the regulation alleged to have been willfully violated, the neglect of the officers and enlisted men to inform petitioners of the existence of the regulation, and the fact of arrest in spite of the peaceful behavior suggest a conspiracy to violate the constitutional rights of petitioners which their conviction makes a success.

3. The Sixth Amendment right to trial by jury is a necessary safeguard in all criminal cases and should not be dissolved in any case unless authorized by Congress, even if the Court has the rulemaking power to do so.

Petitioners convincingly argue that Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates is beyond the rulemaking power of the Court in its statement that trial of petty offenses by a district judge is to be without a jury. Jury trial is a right not to be denied in any case without Congressional authority, and no such authority exists as to 18 U.S.C. Section 1382 in 18 U.S.C. Section 3401(b).

The remarks of the trial judge (Tr. 319, 320) at sentencing highlight a deep jurisprudential reason for hesitation before dissolving the right to jury trial. The framers of the Constitution, mindful of the inevitable impact of crime on the emotions of the trier of fact, sought to bifurcate the responsibility for two reasons: 1) in order that the deliberative process should be so dispersed that no individual's impulses might wrongly deprive defendants of

their rights to cold and impartial verdicts; and 2) in order that representatives of *society* judge crimes against society rather than representatives of the *law*. The criminal law most especially embodies the interests and concerns of society not only in protecting itself against crime but in protecting its members against arbitrary deprivation of physical freedom. The inalienable right to a trial by jury of one's peers guarantees that the letter of the law will always be infused and modified with the common senses and mores of society.

Very wisely, then, this Court has indicated that cases of petty offenses may be tried without jury only under authority of Congress, the *Representative* organ of the Government. *Callan* v. *Wilson*, 127 U.S. 540 (1886).

The right of Trial by Jury comes from the People, and only the Representatives of the People may remove it. Their interests, including caution in removing fundamental rights in certain cases, preclude the making of rules by this Court which would remove these social rights for Legal reasons. This Court must not usurp the province of the Legislature in this regard; even if it decides that it has the *power* to do so, it should not decide that it has the *authority*.

The remarks of the trial judge referred to above personify the abstract danger foreseen by the Framers:

> "I do not consider any of you as martyrs, I consider all of you as violators and maybe it's not true with regard to all the defendants but it is true with some, that it seems to me, that your aims are misdirected. It seems that you're all sail and no anchor. You want to

tear down but you have no constructive suggestions as to what ought to be done to replace what you are attempting to tear down" (Tr. 319-320).

We think this is evidence that the trial judge allowed his own feelings regarding the views of defendants to obscure his impartial analysis of the evidence, especially with regard to specific intent. This is a cogent mandate for the repeal of Rule 3 except as provided by Congress, whether the Court finds the rule beyond its rulemaking power or not.

4. The trial judge imposed sentences on eight male petitioners which penalized them on the illicit basis of gender in violation of their rights to due process and equal protecton of the laws under the Fifth Amendment.

The Court of Appeals failed to comment at all upon the proposition that the sentences imposed by the trial judge on male petitioners penalized them because of their gender. No female petitioner (there are four), nor any person tried by Magistrate, received an outright sentence of incarceration. All eight male petitioners received sentences of from four months to the statutory maximum of six months.

The trial judge consciously must have intended to penalize the eight male petitioners because of their gender: he must have intended the actual, natural, and probable result of his act. He neither defended nor explained his rationale, but simply remarked that he felt his sentences would serve the "interests of justice." The principles of due process and equal protection of the laws call for correction of the manifestly baseless discrimination involved.

This error and its implicit sanction by the Court of Appeals was a gross departure from the expected and usual course of sentencing proceedings, and it calls for exercise of this Court's power of supervision. But there is a further concern: that the Court of Appeals for the Tenth Circuit, in holding that no sentence within the statutory limits will be invalidated, has in effect said that the principles of equal protection and due process are not relevant to the sentencing process. This is a grievous implication in conflict with the holdings of this Court and other circuits, and is in dire need of correction if citizens of the Tenth Circuit are to receive equal justice under the law.

We feel that the silence of the Court of Appeals on this issue, coupled with its remarks as to when sentences may be overturned, is implicitly a sanction of the trial judge's patent and arbitrary discrimination on the illicit basis of gender. However, if the Court feels that such is not to be implied, the cases should be remanded with instructions that the Court of Appeals confront the issue directly. Yet we urge that the sentences be reversed with instructions to modify in accordance with applicable constitutional provisions.

5. The trial judge imposed sentences on all twelve petitioners which penalized the exercise of their statutory rights under 18 U.S.C. Section 3401(b) to stand trial before a district judge rather than accept trial by magistrate, in violation of their rights to due process of law.

Amicus curie urges that the Court of Appeals erred in overlooking or ignoring evidence in the Record indicating that the twelve petitioners were penalized for exercise of

the statutory right to stand trial before the district judge rather than waive this right and accept trial by magistrate. The statute is 18 U.S.C. Section 3401(b).

The Court of Appeals cited the case of *United States* v. *Wiley*, 278 F.2d 500 (7th Circuit 1960), for the proposition that a person may not be punished for exercising in good faith his right to stand trial rather than plead guilty. The Court of Appeals continued:

> "There is no evidence in the record to support the application of this rule to these defendants. We have held and now hold that when the sentence is within the limit prescribed by statute, the length of the sentence is within the discretion of the trial court and will not be disturbed. . . ."

If the Court of Appeals meant to distinguish the *Wiley* case in that it involved a plea of not guilty rather than the passive choice to stand trial before the district judge rather than accept trial by magistrate, then this distinction should not alter the result mandated by *Wiley*. Both the choice to make a plea of not guilty and the choice to have one's guilt proven before district judge are choices protected by the law. The choice in petitioners' cases is protected by 18 U.S.C. Section 3401(b).

In fact, petitioners' sentences were uniformly harsher than those of persons who elected to take trial by magistrate. If the Court meant that no evidence of a disparity exists, then it has ignored the statistics which reveal that the magistrate suspended every sentence imposed on those simultaneously charged with petitioners, excepting William Lemmer, a self-confessed F.B.I. informant, who was not included in the original information.

But the trial judge sentenced all male petitioners to incarceration and sentenced female petitioners to one-year probation terms. It is objectively clear that the effect in the thirty-two cases was uniformly to penalize petitioners and favor others who chose to accept trial by magistrate.

There was, however, subjective evidence in support of this objective conclusion based on sentencing statistics. In the transcript of findings and sentencing, at 319-320, the trial judge made the following remarks just prior to imposing sentences:

> "I think someone has lost sight of the fact that we're here in this courtroom trying an offense of a criminal violation of the law against the United States. We're not here to try the propriety of the war in Indochina and we're not here to test the legality of that situation.
>
> "I think, actually, I have little doubt that nearly every defendant here before me has deliberately attempted to use *this form* as a soapbox to get to the public views which you have expressed and made that confrontation out there for that purpose, to get your names in the paper and not from any standpoint of real love for the country that you live." (Emphasis supplied.)

No one will doubt that the cases here present weighty issues, and that it was entirely appropriate that defendants-petitioners should want these issues to receive the full consideration of the district court. Had the petitioners in bad faith chosen the form in order to get on a soapbox, they most certainly would have testified in the trial itself as to their motives. Yet none of the petitioners took the stand. The trial judge chose to believe, however, that petitioners acted in bad faith, and he clearly penalized them for it.

If the Court meant neither to distinguish *Wiley* nor overlooked this evidence, then its holding that a sentence is invalid only if it exceeds statutory limits, and that the judge's discretion is otherwise untrammeled, must be taken as a repudiation of the principle of *Wiley*, which we urge is applicable to pleas of not guilty and choice of form alike.

This would place the Seventh and Tenth Circuits in effective conflict on the question whether a sentence may be disturbed and must be disturbed in certain circumstances other than a deviation from statutory limits. This conflict is dangerous and intolerable, and is a governing consideration for granting review under Rule 19(b) of the Rules of this Court.

Other jurisdictions have favored modification or reversal of sentences in some circumstances. *See United States* v. *Woosley*, decided by the Eighth Circuit Court of Appeals April 26, 1973, and as yet unreported. Therein it was held that a federal court judge "grossly abused his discretion" by imposing the maximum sentence on a Jehovah's Witness minister for refusing to serve in the military. Statistics were cited by the court in the case to the effect that Woosley's sentence and those of others sentenced for the same crime by the trial judge were far harsher than the national average for the year Woosley's case was tried. *See also U. S.* v. *Martel*, 335 F.2d 764 (4th Circuit 1964); *Baker* v. *United States*, 412 F.2d 1069 (5th Circuit 1969); *United States* v. *Russell*, 260 F.Supp. 265 (M.D. Penn. 1966), all brought to the attention of the Court of Appeals on the point of modification of sentencing.

It is clear that at least four other Circuits have taken on the obligation to enforce the right of criminal defendants not to be sentenced arbitrarily without due process and equal protection of the laws. Yet the Tenth Circuit remains devoted to the concept of infinite judicial discretion in conflict with the other circuits. This holding itself, apart from the sanction of the particular discrimination, is reversible error; the Court of Appeals ought to apply *Wiley* and *Woosley* standards.

We urge that the Court of Appeals be ordered to cause the sentences of petitioners to be suspended, summarily.

CONCLUSION

Under Rule 19(b) of the Rules of this Court, the five issues presented and argued above invoke every listed consideration governing grant of review: cases are in conflict, this Court has not decided the federal questions, related federal questions decided by this Court have been departed from, and accepted judicial practice has been deviated from. No case could be more ripe for review.

WHEREFORE, *Amicus Curiae* respectfully urges that review be granted by issuance of Writ of Certiorari to the Tenth Circuit Court of Appeals in petitioners' cases, and that in addition sentence terms of all thirty-three persons involved be called up for comparison.

Respectfully submitted,

JAMES M. SIMONS
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Counsel of Record

GARY W. DART
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Norman, Oklahoma 73069
Counsel for Amicus Curiae, Oklahoma Lawyers Guild

September, 1973

Counsel wish to express their appreciation to James Drummond, University of Oklahoma law student, for his help in preparing this Motion and Brief.

APPENDIX A

AMERICAN CIVIL LIBERTIES UNION
22 East 40th Street New York, N.Y. 10016 (212) 725-1222

July 6, 1973

Drew Kershen, Esq.
McDonald and Moore
730 Asp, Ste. 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd* v. *U. S.*

Dear Mr. Kershen:

On behalf of petitioners in the above entitled case I consent to the filing of an amicus curiae brief by the Oklahoma Lawyers Guild in support of the petition for certiorari as well as on the merits should the Supreme Court grant certiorari.

Sincerely yours,
s/ Melvin L. Wulf
Melvin L. Wulf
Legal Director

June 29, 1973

Solicitor General of the United States
Department of Justice
Washington, D.C. 20025

Dear Sir:

In compliance with Rule 42 of the Supreme Court Rules, this is to request that you grant consent to the filing of an amicus curiae brief by the Oklahoma Lawyers' Guild in the case of United States v. Jon Randolph Floyd, et al., Criminal Case No. 72-175 from the Western District of Oklahoma and the Tenth Circuit Court of Appeals.

[APPENDIX]

This consent is requested both for the petition of certiorari which will be presented to the court by lawyers for the defendants below, and for the case on the merits should certiorari be granted. The amicus brief would be on behalf of the defendants below and petitioners here.

The organization seeking to submit a brief for the court's consideration is the Oklahoma chapter of the National Lawyers' Guild. This group is vitally concerned with issues presented by the rulings of the courts below and by the facts of the cases, which will not be dealt with in the primary brief but which are germane to the Court's understanding of the case and to the Government's understanding also.

Thank you sincerely for your attention to this matter.

Respectfully yours,

t/ Drew Kershen
Oklahoma Lawyers' Guild

[printed seal]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530
July 16, 1973

(202) 737-8200
-2211

AIRMAIL

Drew Kershen, Esquire
McDonald and Moore
730 Asp, Suite 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd, et al.* v. *United States*

Dear Mr. Kershen:

With reference to your letter of June 29, 1973, requesting the Solicitor General's consent to your filing of an

amicus brief in the above entitled case on behalf of the Oklahoma Lawyers' Guild, the Solicitor General has asked me to inquire more specifically concerning the Guild's interest in the case.

The Department of Justice has not yet received a copy of the Tenth Circuit's opinion in this case or of a petition for certiorari, and your letter of June 29 does not inform us of what the issues are in the case or of what the Guild's interest is. The Solicitor General will be happy to consider your request for his consent as soon as you apprise us of this information so that he will know what he would be consenting to.

Yours sincerely,
s/ Lawrence G. Wallace
Lawrence G. Wallace
Deputy Solicitor General

[printed seal]

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530
August 3, 1973

AIRMAIL

Drew Kershen, Esquire
McDonald and Moore
730 Asp, Suite 208
Norman, Oklahoma 73069

Re: *Jon Randolph Floyd, et al.* v. *United States*
No. 73-205

Dear Mr. Kershen:

With reference to your request for my consent to your filing of an amicus brief in the above case on behalf of the Oklahoma Lawyers' Guild, Mr. Wallace of my staff has informed me after discussion with you by telephone that it is your intention to devote your brief to a discussion of issues other than those fairly comprised in the questions

[APPENDIX]

presented in the petition for certiorari. It is our view that only the questions set forth in the petition or fairly comprised therein are properly before the Court under Rule 23 (1)(c) of the Court's Rules.

Accordingly, while I would be happy to consent to your filing of an amicus brief on behalf of the Guild for the purpose of commenting on the questions presented in the petition, it would be inappropriate for me to consent to your filing of the amicus brief you have informed us that you wish to file.

Sincerely,

s/ Robert H. Bork
Robert H. Bork
Solicitor General

cc: Hon. Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D. C. 20543